

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>RAUL R. FRANCO</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 169,071 & 172,580
<b>NATIONAL BEEF PACKING</b>	)	
Respondent	)	
AND	)	
	)	
<b>LUMBERMEN'S UNDERWRITING ALLIANCE</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Both the claimant and Kansas Workers Compensation Fund appealed from Awards entered by Administrative Law Judge Jon L. Frobish on May 24, 1996.

**APPEARANCES**

Claimant appeared by his attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kerry E. McQueen of Liberal, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Randall D. Grisell of Garden City, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board has reviewed and considered the record listed in the Awards. The Appeals Board has also adopted the stipulations listed in the Awards.

**ISSUES**

The Administrative Law Judge awarded benefits for a 10 percent functional impairment to the right shoulder in Docket No. 169,071 for injury on April 20, 1992, and a 50 percent work disability on Docket No. 172,580 for injury on September 15, 1992. For the second injury, Docket No. 172,580, the Administrative Law Judge assessed 80 percent of the award against the Kansas Workers Compensation Fund (Fund) and gave the Fund and respondent full credit under K.S.A. 44-510a (Ensley) for benefits due on the first injury, Docket No. 169,071.

Claimant asked the Appeals Board to review the following issues:

- (1) Nature and extent of disability.
- (2) Application of credit under K.S.A. 44-510a.

The Kansas Workers Compensation Fund (Fund) asks for a review of the decision to assess 80 percent of the Award in Docket No. 172,580 against the Fund.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board concludes that the Awards by the Administrative Law Judge should be modified. The Board concludes claimant is entitled to a work disability for both accidents, the April 20, 1992, injury to claimant's right shoulder and also the September 15, 1992, injury to claimant's left shoulder. The Board finds the Fund should be liable for all of the benefits due on Docket No. 172,580 and that the Fund is entitled to 100 percent credit for benefits due on the first injury, Docket No. 169,071.

- (1) The Appeals Board finds that claimant is entitled to benefits for a 25 percent work disability for the injury to his right shoulder on April 20, 1992, Docket No. 169,071.

Claimant originally alleged and testified that he injured his right shoulder on April 20, 1992. At the deposition of Ms. Janet Kilgore, the parties agreed to amend the pleadings and stipulation to an April 14, 1992, date of accident. However, in the submission letters the parties stipulate, as they had at the regular hearing, to an April 20, 1992, date of accident. This last stipulated date will be used as the date of accident for purposes of this award.

The April 20, 1992, injury occurred while claimant was bagging brisket. He felt a popping in his right shoulder and wrist. He reported the injuries to his supervisor and was referred initially to Dr. Edmundo C. Estrada and later to Dr. Guillermo Garcia. Dr. Garcia diagnosed a torn rotator cuff and suggested surgery which claimant declined. Claimant was off work and treated conservatively until September of 1992. At that time he was released and returned to light duty work.

When claimant returned to work on September 8, 1992, he was placed in a position picking up and transferring short ribs. According to claimant, he worked with his left arm only. He injured his left shoulder on September 15, 1992. Respondent referred him again to Dr. Estrada, but claimant requested permission to see Dr. H. C. Palmer. Dr. Palmer took claimant off work, and he has not since returned to his employment for respondent.

Dr. Jay Stanley Jones ultimately became claimant's authorized treating physician. Dr. Jones diagnosed bilateral rotator cuff tears. He performed surgical repair for the right shoulder on February 23, 1993. Claimant suffered an additional tear of the right rotator cuff during physical therapy, and Dr. Jones performed a second surgery on the right shoulder in August of 1994. Claimant did not have surgical repair done for the left shoulder.

Respondent first argues claimant's award for the April 20, 1992, injury should be limited to functional impairment because claimant came back to work on September 8, 1992, at a comparable wage. According to respondent, the presumption found in K.S.A. 1987 Supp. 44-510e should, therefore, be applied.

The Appeals Board finds the presumption is overcome by other evidence in this case. Claimant returned to work but only for a brief time, approximately one week. During the one week of reemployment, claimant worked with his left arm only and was not able to keep up with the work. He then injured his left shoulder. A torn rotator cuff had been diagnosed on the right and surgery had been suggested for the right shoulder before claimant returned for that one week of work. Although Dr. Jones did surgery on the right after claimant's brief return, the Board finds the injury for which Dr. Jones did surgery and the ultimate disability and restrictions recommended on the right were the result of the April 20, 1992, injury. The Board also finds that because of the injury to the right upper extremity, claimant was not able to perform the work assigned upon his return. This evidence overcomes the presumption against work disability created by his brief return to work at a comparable wage. K.S.A. 1987 Supp. 44-510e.

The record in this case includes deposition testimony by Dr. Jones and also by C. Reiff Brown, M.D. Both testified as to the nature and extent of claimant's disability, including work restrictions. Dr. Jones, the physician who performed the two surgeries on the right shoulder, gave what he described as a "guesstimate" of the impairment for the left shoulder. He thought it would be between 5 and 8 percent. He rated the right shoulder as 12 percent permanent partial impairment. In his deposition, he stated that he assigned the following restrictions:

Twenty pounds, no work above shoulder level, climbing never, balancing occasionally, bending occasionally, twisting occasionally, kneeling occasionally, crawling occasionally. He doesn't have any restrictions on walking. Climbing, never. Driving he doesn't have any restrictions, on sitting or standing he doesn't have restrictions, on reaching below shoulder level he

doesn't have restrictions. On grasping, he can use his hands repetitive without the use of his shoulder; and he can use his hands with force, without the use of his shoulders. He has no restrictions on heat, cold, dust, fumes, chemicals or noise.

Dr. Brown saw the claimant on June 15, 1994, and again on April 4, 1996. He diagnosed residuals of biceps and rotator cuff tendonitis and rotator cuff tear impingement syndrome surgically treated on the right with residual tendonitis of the wrists but no dysfunction of the left wrist. After his examination in April 1996, an examination which followed claimant's second surgical procedure on the right shoulder, Dr. Brown rated claimant's right upper extremity as 10 percent of the body as a whole and left upper extremity as a 7 percent for a total combined of 17 percent to the body as a whole. As restrictions he recommended that claimant avoid use of the hands above chest level and avoid use of the hands at waist level through a range of motion that would require movement away from the body more than 15 inches in any direction. He indicated claimant should lift only 10 pounds occasionally from waist to chest, and only 5 pounds frequently. He also indicated claimant should avoid frequent grasping with the right hand with forces greater than 5 pounds.

Two vocational experts, Ms. Karen Terrill and Mr. Jerry Hardin, testified regarding the effect of the injuries on claimant's ability to earn a comparable wage and ability to obtain and retain employment in the open labor market. However, only Ms. Terrill gave opinions regarding the effect of right shoulder injury only. She testified that from the restrictions imposed to the right alone, claimant lost 45 to 50 percent of his ability to obtain or retain employment in the open labor market. Although Mr. Hardin and Ms. Terrill also both gave opinions regarding claimant's loss of ability to earn a comparable wage, neither gave an opinion based upon the injury and restrictions to the right upper extremity only. Claimant has, therefore, not established the wage loss prong for work disability from the April 20, 1992, accident.

Based on Ms. Terrill's opinions, the Appeals Board finds that claimant sustained a 50 percent loss of ability to obtain or retain employment in the open labor market. By giving equal weight to the wage (0%) and labor market (50%) loss, the Appeals Board finds that claimant sustained a 25 percent work disability from the April 20, 1992, right upper extremity injury.

(2) The Appeals Board finds claimant sustained a 50 percent work disability as a result of the September 15, 1992, accident.

As previously stated, claimant returned to work for approximately one week in September 1992 and injured his left shoulder. Again, Ms. Terrill and Mr. Hardin testified as to the effect of the injury on claimant's ability to earn a comparable wage and ability to obtain and retain employment in the open labor market. Ms. Terrill gave opinions regarding the loss of access to the open labor market based not only upon Dr. Jones and

Dr. Brown but also Dr. Garcia and Dr. Palmer. Dr. Jones describes his opinion of the left shoulder disability as a “guesstimate.” It appears that Dr. Palmer and Dr. Garcia gave restrictions before the full extent of claimant’s injury in the right shoulder, including the aggravation and reinjury, were known.

For the initial injury the Appeals Board has relied exclusively on the opinion of Ms. Terrill based upon the restrictions recommended by Dr. Brown. For the reasons stated above, the Appeals Board considers those restrictions and opinions the more reasonable as to the second injury than those based on opinions by the other physicians. Ms. Terrill has opined that claimant lost a total of 60 percent of his ability to obtain and retain employment in the open labor market based upon the total restrictions by Dr. Brown. She also projects a post-injury wage which would result in a 40 percent loss of ability to earn a comparable wage when compared to claimant’s actual pre-injury average weekly wage. Giving equal weight to the loss of earning and loss of labor market factors, the Appeals Board has concluded claimant sustained a 50 percent work disability.

These opinions consider restrictions for the injury to the right shoulder as well as the left. The Board considers it appropriate to combine these because the restrictions from both contribute to the work disability. Pyramiding of benefits is avoided by the credit applied under K.S.A. 44-510a (Ensley) as set out below.

(3) The Appeals Board finds the Kansas Workers Compensation Fund is liable for 100 percent of the Award in Docket No. 172,580, the claim for injury on September 15, 1992.

The Workers Compensation Fund is liable for all or a portion of awards where the respondent employs or retains an employ with knowledge of an impairment which constitutes a handicap and the impairment contributes to or causes subsequent compensable wages. K.S.A. 44-567 (Ensley). In this case respondent had a knowledge of claimant’s initial injury and the subsequent medical treatment reflecting a torn rotator cuff. In our view, the right shoulder injury constituted a handicap. Although Dr. Jones gave a different opinion, the Appeals Board finds most convincing Dr. Brown’s opinion that the left shoulder injury probably or most likely would not have occurred but for the preexisting impairment. This testimony is confirmed by claimant’s testimony that he was working with one hand, because of the right shoulder injury, when he injured his left shoulder. The Workers Compensation Fund is, therefore, liable for 100 percent of the award assessed on the second injury.

(4) The Workers Compensation Fund is entitled to 100 percent credit for payments made under Docket No. 169,071, the right shoulder injury on April 20, 1992.

K.S.A. 1987 Supp. 44-510a provides in pertinent part as follows:

(a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. . . .

(b) The percentage of contribution that the prior disability contributes to the later disability shall be applied to the money rate actually collected or collectible for the prior injury and the amount so determined shall be deducted from the money rate awarded for the later injury.

The Appeals Board finds that the prior disability, that is the disability from the April 20, 1992, injury, contributed 100 percent to the disability following the later injury. The restrictions following the injury of April 20, 1992, are fully accounted for as a part of the work disability awarded for the second accident. The Fund is entitled to 100 percent credit for those benefits due on the initial award. In the award under Docket No. 172,580, the Administrative Law Judge has set out the number of weeks for which the credit is to be applied. The Appeals Board agrees with and adopts the conclusion that the credit will be applied for the first 237.09 weeks, the weeks the permanent partial disability overlaps. Because the Appeals Board has awarded different benefits for the injury of April 20, 1992, the dollar amount of the credit will differ. Specifically, the amount of credit will be \$65.33 per week.

### **AWARD**

**WHEREFORE**, the Appeals Board concludes that the Awards in Docket Nos. 169,071 and 172,580 should be, and the same are hereby, modified as follows:

#### **Docket No. 169,071**

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN DOCKET NO. 169,071 IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Raul R. Franco, and against the respondent, National Beef Packing, and its insurance carrier, Lumbermen's Underwriting Alliance, for an accidental injury which occurred April 20, 1992, and based upon an average weekly wage of \$391.93 for 19.14 weeks of temporary total disability compensation at the rate of \$261.30 per week or \$5,001.28, followed by 395.86 weeks at the rate of \$65.33 per week or \$25,861.53, for a 25% permanent partial general disability, making a total award of \$30,862.81.

As of October 31, 1997, there is due and owing claimant 19.14 weeks of temporary total disability compensation at the rate of \$261.30 per week or \$5,001.28, followed by 269.43 weeks of permanent partial compensation at the rate of \$65.33 per week in the sum of \$17,601.86 for a total of \$22,603.14, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$8,259.67 is to be paid for 126.43 weeks at the rate of \$65.33 per week, until fully paid or further order of the Director.

Docket No. 172,580

**AN AWARD OF COMPENSATION IS HEREBY MADE IN DOCKET NO. 172,580 IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Raul R. Franco, and against the Kansas Workers Compensation Fund for an accidental injury on September 15, 1992, based on an average weekly wage of \$416.14 for 156.91 weeks of temporary total disability at the rate of \$277.44 per week or \$43,533.11 followed by 237.09 weeks at \$73.39 per week (\$138.72 weekly rate for 50% disability less \$65.33 per week credit) or \$17,400.04 followed by 21 weeks at the rate of \$138.72 per week or \$2,913.12 for a total award of \$63,846.27.

As of October 31, 1997, there is due and owing 156.91 weeks of temporary total disability at the rate of \$277.44 per week or \$43,533.11 followed by 110.52 weeks at the rate of \$73.39 or \$8,111.06 for a total due and owing of \$51,644.17. The remainder of \$12,202.10 is to be paid at \$73.39 per week for 126.57 weeks followed by 21 weeks at \$138.72.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS  
Kerry E. McQueen, Liberal, KS  
Randall D. Grisell, Garden City, KS  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Director